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IN THE

Supreme Court of the United States

October Term, 1940

No. 3

UNITED STATES OF AMERICA,

Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, et al.,

Appellees.

APPEAL FROM DISTRICT COURT, EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF FOR APPELLEES ON REARGUMENT.

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INDEX AND SUMMARY OF ARGUMENT.

I. Purpose, scope, and effect of the Act of June 25, 1929, p. 7.

A. Section 1 is an exercise of the power of eminent domain, p. 8.

B. Section 2 merely implements Section 1, p. 9.

C. Sections 5 and 6 direct an adjustment of the grants and expropriate the indemnity rights upon payment of just compensation, pp. 9, 10.

II. The Act of June 25, 1929, does not affect substantive rights nor accord any relief or make any defenses available other than those the parties have under established principles of law and equity, p. 12.

A. Established principles of law and equity are applicable in the action directed to be brought by Sections 5 and 6 of the Act of June 25, 1929, p. 15.

III. Bearing of the subject matter of certain assignments of error upon the nature and extent of the relief accorded and defenses made available to the parties respectively by the Act of June 25, 1929, p. 30.

A. The assignments have only such bearing or effect upon substantive rights of the parties as belong to them under established principles of law and equity, p. 30.

B. Non-construction of main line from Wallula to Portland, p. 30. See appellees' brief last term, p. 24.

C. The preemption proviso, p. 31. See post, p. 39. See also argument in appellees' brief, last term, p. 121, et seq.

D. 1875 and 1896 foreclosures, p. 31.

1. Legal effect of 1875 foreclosure and deeds made pursuant to the plan of reorganization to revest title to the railroad and lands

in the federal corporation, the Northern Pacific Railroad Company, p. 31.

2. Appellant is estopped to say that the Northern Pacific Railroad Company did not perform its contract and earn the lands and that the Northern Pacific Railway Company did not succeed to the rights of the Northern Pacific Railroad Company, p. 34.

E. Preemption proviso of the Joint Resolution of 1870, p. 39.

1. There is no requirement in the preemption proviso of the Joint Resolution of 1870 that the foreclosure sales be to third persons; the sale of the lands to the Northern Pacific Railway Company was within the proviso, p. 40.
2. The proviso applies only to the lands granted by the Joint Resolution, p. 43.
3. The Joint Resolution does not restrict the power to mortgage lands granted by the Act of 1864, p. 46.
4. Validity of the foreclosure sales and succession of the Northern Pacific Railway Company to the lands and rights of the Railroad Company are res adjudicata, p. 47.
5. Appellant's contention that only one mortgage was authorized cannot be sustained, p. 48.

F. Payment of survey fees, p. 49.

G. Alleged illegal disposition of capital stock and dissipation of assets, p. 50.

1. The United States was not injured and has no cause of action therefor. *United States v. Union Pacific,* 98 U. S. 569, p. 52.

H. Mineral Classification, p. 54. See also appellees' brief, last term, p. 59.

1. Whether the United States is plaintiff in this action or, as contended for appellant, the company is plaintiff, is immaterial. The company is entitled to just compensation irrespective of the form of the action or whether it is plaintiff or defendant, p. 55.

I. Unauthorized withdrawals, p. 56.

1. The rights of the Railway Company can not be affected by the alleged mistake of the officials of the United States in making the withdrawals, p. 58, et seq.
2. The United States was not prejudiced by the alleged unauthorized withdrawals because the company was entitled to all the lands it received, p. 57, et seq.
3. The alleged unauthorized withdrawals are immaterial to any question presented under the Act of June 25, 1929, p. 57.

4. But for the mistake of officials of the United States in making the general route withdrawals, the company could and would have filed its map of definite location under which the lands would have been lawfully withdrawn, p. 58, et seq.

J. Unsurveyed lands and lands restored to the public domain after withdrawal, p. 59.

K. Idaho withdrawals, p. 61.

1. Appellant's statement of the acreage affected is incorrect, p. 61.
2. This point was not made below nor passed upon by the Master, and is not available in this Court, p. 61.
3. In cases where the deficiency was less than the acreage withdrawn, the withdrawal is affected only to the extent that the company is entitled to make its selection from the withdrawn area, p. 63.

L. Patents for 428,986.68 acres, p. 63.

1. Tract-for-tract designation of leases for 45,180 acres of indemnity lands for which patents were awarded by the decree, p. 64, et seq. These lands were charged to the company in the Government's exhibits, and its right to patents was conceded by appellant.
2. The objection was not made below and is not available here, p. 64.

M. That there would have been no deficiency if the company had constructed the Wallula-Portland line, p. 65.

1. The Point was not made below and is not available here, p. 65.
2. The consequence of non-construction of the Wallula-Portland line is discussed, p. 24 of appellees' brief last term under heading "Forfeiture".

N. That the company is not entitled to compensation for it did not show that it could or would have selected the withdrawn lands, p. 65.

1. This point was not raised below and is not available in this Court, p. 65.
2. The *Forest Reserve Case* is a complete answer, pp. 65, 66.
3. The argument proves too much, for if a portion of the indemnity lands could have been appropriated by the United States for this reason, so, by the same token, every foot of the indemnity lands could have been withdrawn and the indemnity rights totally defeated, p. 65, 66.

The points upon which the Court desires reargument may be summarized as follows:

I. The purpose, scope, and effect of the Act of June 25, 1929;

II. The relief thereby accorded the parties and defenses thereby made available to them;

III. Certain assignments of error insofar as their subject matter bears upon the nature and extent of the relief accorded and the defenses made available to the parties by §§ 1, 2, 5, and 6 of the Act of June 25, 1929.

CASES AND AUTHORITIES CITED.

	Page
Atlantic & Pacific R. Co. v. Mingus, 165 U. S. 413	24
Baggs's Appeal, 43 Pa. 512	29
Dayton Airplane Co. v. United States, 21 F. 2d 673	27
Ervine's Appeal, 16 Pa. 256	29
Eastern Terminus Case, 95 Fed. 864, 177 U. S. 435	28
Forest Reserve Case, 256 U. S. 51	6, 7, 8, 11, 20, 21, 60, 61, 62, 65, 66
Fritch v. United States, 236 Fed. 133	27
Guy v. Hermance, 5 Cal. 73	29
Grand Trunk Western Ry. Co. v. United States, 252 U. S. 112	31
Hewitt v. Schultz, 180 U. S. 139	57, 59
Holden v. James, 11 Mass. 396	29
Jacobs v. United States, 290 U. S. 13	9, 21, 56
Lynch v. United States, 292 U. S. 571	9, 22
Monongahela Navigation Co. v. United States, 148 U. S. 312	9, 22, 29
Maryland Steel Co. v. United States, 235 U. S. 451	28
Nelson v. Northern Pacific, 188 U. S. 108	56, 59
Northern Pacific v. United States, 227 U. S. 355, (see Yakima Indian Reservation case, this table).	
Northern Pacific Railway Co. v. Boyd, 228 U. S. 482	41
Northern Pacific Railroad Co. v. Traill County, 115 U. S. 600	49

Oregon & California R. Co. v. United States, 238 U. S. 393, 243 U. S. 549 18
Paramino v. Marshall, 309 U. S. 370 27
Payne v. C. P. Ry., 255 U. S. 228 63
Pettigrew v. United States, 97 U. S. 385 27
Phelps v. United States, 274 U. S. 341 22
Platt v. Union Pacific, 99 U. S. 48 45
Portland Overlap Case, 193 U. S. 1 49
Pritchard v. Norton, 106 U. S. 124 27
Reading Steel Casting Co. v. United States, 268 U. S. 186 27
Roles Shingle Co. v. Bergerson, 142 Ore. 131, 19 P. 2d 94 29
Sinking-Fund Cases, 99 U. S. 700 ..... 8, 23, 26
Seaboard Air Line Co. v. United States, 261 U. S. 299 22
United States v. California & Oregon Land Co., 192 U. S. 355 28
United States v. Denver & R. G. W. R. Co., 16 F. 2d 374 28
United States v. Moser, 266 U. S. 236 28
United States v. Northern Pacific, 95 Fed. 864, 177 U. S. 435, (see Eastern Terminus case, this table).
United States v. Northern Pacific, 256 U. S. 51, (see Forest Reserve case, this table).
United States v. Oregon Lumber Co., 260 U. S. 290 ..... 17, 28, 55
United States v. Rogers, 255 U. S. 163 22
United States v. Stinson, 125 Fed. 907, 197 U. S. 200 27
United States v. Union Pacific, 98 U. S. 569 ..... 4, 12, 52
United States v. Union Pacific, 160 U. S. 1 9

United States v. Winona etc. R. Co., 165 U. S. 463 ..28, 58
Yakima Indian Reservation Case, 227 U. S. 355 49
Cooley, Constitutional Limitations, (8th ed., 1927) 28

Land Decisions
Heath v. Northern Pacific, 38 L. D. 77 46
2 L. D. 511 62
29 L. D. 387 38
29 L. D. 316 37

Opinions of Attorneys General
21 Op. A. G. 486 37
25 Op. A. G. 401 38

Statutes
Act of July 2, 1864, 13 Stat. 365 .....33, 36, 37, 38, 43, 46, 47
Joint Resolution of May 31, 1870, 16 Stat. 378 ..38, 39, 43, 46, 47, 52
Act of March 3, 1873, 17 Stat. 509 12
Act of July 6, 1886, 24 Stat. 123 .....7, 24
General Adjustment Act of March 3, 1887, 24 Stat. 556 .....14, 25
General Forfeiture Act of September 29, 1890, 26 Stat. 496 51
Joint Resolution of June 5, 1924, 43 Stat. 461 63
Act of June 25, 1929, 46 Stat. 41 .....8, 12

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I. Purpose, Scope and Effect of the Act of June 25, 1929.

In the *Forest Reserve Case,* 256 U. S. 51, this Court held that withdrawals of indemnity lands were invalid unless there remained sufficient surveyed, non-mineral lands *available for selection* to satisfy the grant, and defined the measure of the grant as the aggregate of the odd-numbered sections within place limits unless, (a) part of the grant included only a moiety of those sections; or, (b) the route of the road and that of another with a prior land grant were found to be upon the same general line, in which event a stated deduction should be made. There would be no right of indemnity for the moiety not included nor for the lands required to be deducted. The case was remanded for adjustment accordingly. The Secretary of the Interior, (by the Commissioner of the General Land Office), acting under the Act of 1887, 24 Stat. 556, immediately undertook the adjustment. He made a tentative determination, termed a "tentative adjustment", dated December 19, 1923, copies of which he served upon the United States Forester, the railway company, and the Attorney General, for their comments and objections. The tentative adjustment indicated deficiencies on December 31, 1921 of 2,703,270.12 acres in the grant of 1864, and 1,230,442.39 acres in the grant of 1870. These deficiencies invalidated the withdrawals because the lands were subject to the railway com-

pany's selection rights by the decision in the *Forest Reserve Case.* The Forester filed many objections to the tentative adjustment, which led to passage of the Joint Resolution of June 5, 1924, suspending patents and completion of the adjustment until the matter had been investigated by Congress. A joint Congressional committee was set up, conducted extensive hearings, and made a report which led to the Act of June 25, 1929. (46 Stat. 41.)

There is a correct summary of the Act of 1929 in appellant's brief on reargument, p. 27. Section 1 provides that all lands within the indemnity limits of the two grants which were, on June 5, 1924, (date of the Joint Resolution), within national forests or other Government reservations, and which would be available to the company, (under the decision in the *Forest Reserve Case*) in satisfaction of deficiencies in the grants, are retained by the United States free of the company's right of indemnity selection; provided, that the company shall receive compensation for the lands in the amount the court shall hold that compensation is due in the judicial proceeding directed by Section 5. Obviously and unquestionably, Section 1 is an exercise of eminent domain power. It could not be otherwise, for this Court had just said in the *Forest Reserve Case* (256 U. S. 51, 64) that "such rights are within the protection of the due process of law clause of the Constitution. *Sinking-Fund Cases,* 99 U. S. 700, 718." Congress knew that the United States could not "legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad", *Sinking-Fund Cases,* supra, p. 719, nor acquire them otherwise than by payment of just compensation,

judicially ascertained. *Monongahela Navigation Co. v. U. S.*, 148 U. S. 312; *Jacobs v. U. S.*, 290 U. S. 13; *Lynch v. U. S.*, 292 U. S. 571. *U. S. v. Union Pacific Ry. Co.*, 160 U. S. 1, 37, cited by appellant at page 78 to prove that the expropriation is authorized by the reserved power of amendment of the charter, holds the exact opposite.

Section 2, read literally, purports to declare a forfeiture of the very same selection rights for which compensation is provided by Section 1. The conflict is discussed at p. 25 of appellee's brief filed last term. Another, and perhaps better, view (stated by Mr. Davis at the first oral argument) is that Section 2 merely implements the expropriation declared by Section 1.

Sections 5 and 6, though prolix and tautological, are not doubtful. At page 73 of appellant's brief on reargument, the purpose, scope, and effect of the Act of 1929 are well stated:

> "C. The Act Required a Complete Accounting, Created a Special Jurisdiction and a Special Procedure, and Provided Relief Appropriate to Whatever Determination Might Ultimately Be Made".

Under this heading the discussion concludes (p. 76):

> "If the company prevailed, it was to obtain compensation to the extent of the full value of its interest in the indemnity lands withheld. The title of the United States to these lands was to be quieted in any event. If the United States prevailed, it was to be freed from any obligation in respect of compensation, and was entitled to have the company account to it for any excess values which the company might be shown to have received. Appropriate provision was made for set-offs, and the court was empowered to '*render such judgments*

and decrees as law and equity may require.'" (Italics ours.)

In short, Sections 5 and 6 directed a final adjustment of the grants, requiring determination of the measure of the grants, the extent to which the grants have been satisfied by lands heretofore conveyed, deficiencies in the grants after charging the company and crediting the United States with any and all lands heretofore erroneously patented to the company. There has not been and is not now any dispute concerning the scope and effect of the Act. The Master, in his first report, R. 275, summarized the Act and said:

> "It will be seen from the foregoing abbreviation that in the contemplated litigation directed, it was intended every question from the organization of the company to the date of the Act that had been, or that now might be, raised, should be presented to the Court and finally determined; and that upon such determination should be based an adjustment of the grant."

To this neither party took exception. The findings and decree were framed accordingly. Every issue presented by the complaint and directed by Sections 5 and 6 to be determined has been determined. The findings are printed, R. 603, and the decree, R. 639. It is not even suggested that they do not literally comply with Sections 5 and 6.

Paragraph V of the decree finds the acreage patented under both grants, the acreage outside the reserves to which the company is entitled to patents, the acreage of expropriated lands for which the company is entitled to compensation, and concludes as follows:

"* * * that upon delivery of patents for said 428,986.68 acres (outside the reserves) and payment of just compensation for said 1,453,061.02 acres, as provided for in said Act of June 25, 1929, the United States will have fully complied with the terms and conditions of said Act of July 2, 1864, and said Joint Resolution of May 31, 1870, as supplemented by Act of June 25, 1929."

Paragraph IX of the decree quiets title of the United States to certain lands decreed to the United States without compensation.

Paragraph XI of the decree adjudges that certain lands are mineral and excepted from the grants, and the Government's title thereto is quieted without compensation.

The accounting directed by Section 5 of the Act, by correcting errors in the administration of the grants, etc., is complied with. For example, Paragraph IV of the findings credits the Government with the Portage Railroad conflict of 347,141.24 acres, one of the deductions from the grant which had been specified in the *Forest Reserve Case*, which had erroneously been treated as a loss to the grant. Paragraph V of the findings credits the Government with 5,785.58 acres due to an error in laying down the northern and southern limits of the grant through Montana. Paragraph V½ of the findings corrects the Ainsworth and Portland terminal errors, amounting to 61,779.05 acres and 4,311.47 acres, for which the company will be charged in the final accounting.

In short, the findings and decree accomplish a final and complete adjudication of the grants. We can think of no circumstances under which either the United States or the

company may hereafter make any claim against the other for lands or compensation for lands, for the decree is res adjudicata of any and every such question.

II. Relief Accorded to the Parties and Defenses Made Available to Them by the Act of June 25, 1929.

The Act of June 25, 1929, does not confer on either party any *substantive rights*. It provides a judicial proceeding for adjustment of the grants and expropriates the indemnity rights upon payment of just compensation. Neither does the Act make "defenses available" nor, for that matter, non-available. For instance, if res adjudicata were not theretofore a defense, it was not made so by the Act. *The Act left the respective rights and obligations of the parties exactly where they were under settled principles of law and equity.* It did not make a new rule for this particular case, confer any new substantive right, or deprive either party of any substantive right it would have had if the adjustment had been under the Act of 1887, the Act of 1929 never enacted. The Act of 1929 only provided a more convenient procedure than afforded by existing methods. The Act has a precedent in the special act of March 3, 1873, 17 Stat. 509, before this Court in *United States v. Union Pacific R. R. Co.*, 98 U. S. 569. That act directed suit by the Attorney General against the Union Pacific, its directors, contractors, and others, to recover for the corporation or the United States money and property of which the corporation had been defrauded. The act provided for suit against non-residents of the district, for joinder of multifarious causes of action, and regulated procedure. Defendants argued that the act de-

prived them of substantive rights. This Court held that the act only provided a convenient method of procedure, and was valid. The Court said, pp. 606-608:

> "It may be said, and probably with truth, that such statutes, when they have been held to be valid by the courts, do not infringe the substantial rights of property or of contract of the parties affected, but are intended to supply defects of power in the courts, or to give them improved methods of procedure in dealing with existing rights. This leads to an inquiry indispensable to a sound decision of the case before us; namely, does this statute, by its true construction, do anything more than this? We might rest this branch of the case upon the concession of counsel for appellants, made both in their brief and in the oral argument, but we proceed to examine the proposition for ourselves. *The first suggestion of the legal mind on this inquiry is, that it will not be presumed, unless the language of the statute imperatively requires it, that Congress, by a retrospective law, intended to create new rights in one party to the suit at the expense, or by an invasion of the rights, of other parties; or, where no right of action founded on past transactions existed, that Congress intended to create it.* * * *But whatever be the relief asked, it could only, by the express terms of the act, be granted to that party who was in equity thereunto entitled. It is very plain that there was here no new right established. No new cause of equitable relief. No new rule for determining what were the rights of the parties. That was to be decided by the principles of equity; not new principles of equity, but the existing principles of equitable jurisprudence.* * * *We are of opinion, therefore, that the act in question was intended not to change the substantial rights of the parties to the suit which it authorized, but to provide a specific method*

of procedure, which, by removing restrictions on the jurisdiction, process, and pleading in ordinary cases, would give a larger scope for the action of the court, and a more economical and efficient remedy than before existed; and that it is a valid and constitutional exercise of legislative power." (Italics supplied).

The General Adjustment Act of March 3, 1887, 24 Stat. 556 (p. 70, Appendix to appellant's brief last term) certainly does not abrogate established principles of law and equity or confer new rights. Many adjustments have been made under that act and many such cases have come to this Court wherein established principles were applied. The adjustment made by the decree in this case could, (aside from the expropriation), have been made under that act. The Secretary was about to make such an adjustment when the matter was taken from him and transferred to the courts by the Act of 1929. Attorney General Sargent, at the request of the Joint Committee, prepared a bill for adjustment similar to the Act of 1887. J. C. R. V. 5, p. 5332A. Certainly under that bill the same decree could have been entered. There can be no suggestion that the proposed bill established a new rule and abrogated established principles of law and equity, such as res adjudicata, waiver, and estoppel. While Sections 5 and 6 of the Act of 1929 are prolix and redundant, and prescribe more in detail the matters to be determined, they do not suggest that the determination should be made otherwise than by established principles. On the contrary, Section 6 concludes: "To carry out this enactment the court may render such judgments and decrees as law and equity may require."

A. *The established principles of law and equity are fully applicable in the action directed to be brought by Sections 5 and 6 of the Act of 1929.*

Appellant argues, p. 79, that "the defenses of acquiescence, waiver and estoppel were not available to *the company.*" We emphasize "the company" because appellant relies on them when it suits its purpose. The point is argued by appellant under five heads; namely, (a), that the Act of 1929 in terms eliminates these defenses, p. 79; (b), that the defenses are inherently unavailable against a statutory contract, p. 82; (c), that essential elements of these defenses are lacking, p. 85; (d), that even if these defenses were present, Congress could constitutionally take them away, p. 98; and (e), that even if the defenses could not be taken away, their removal can be affixed as a condition to the compensation which the Act of 1929 grants the company, p. 107. These contentions are antithetical to the purpose, scope, and effect of the Act, stated by appellant, p. 70, et seq. The purpose of Congress to accord a *judicial* adjustment is stressed by appellant, supported by quotations from the Congressional debates and statements made to Congress by the sponsor of the bill. We repeat a few excerpts:

> "Mr. Colton in the House, 70th Congress (70 Cong. Rec. 5121): 'The bill if enacted will permit the United States to go into the courts on a comprehensive basis, and at the same time it will afford the grantee railroad company or its successor an opportunity to be fully heard in support of such contentions as it may desire to make in opposition to any position taken by the United States in the court proceedings.
>
> * * * * *

> "The extent of the forfeiture of the unsatisfied indemnity rights is necessarily dependent upon what the courts hold the grantee railroad company or its successor is entitled to receive under the granting acts.'" (P. 71 Appellant's brief on reargument.)

Appellant concludes the discussion, on pp. 72-73, as follows:

> "Quite to the contrary, Congress did not undertake to decide finally the controversy between the parties. What it did do was to announce that, speaking for the United States, it believed that its obligations under the contract were discharged, and it directed that suit be commenced so that the matter might be adjudicated in the courts. The entire transaction evidences the utmost good faith on the part of Congress."

With the next breath appellant argues that established rules of law and equity jurisprudence are abrogated, (at least where they protect the company's vested rights), the case predetermined in favor of the United States. Appellant's conception of due process of law hardly conforms to the Fifth Amendment.

If Congress wished to confiscate the company's rights and lands, it did not need to resort to the trick and device of pretending to accord a judicial determination—stage a sham battle of which the victor was already chosen. It need not have passed the Act of 1929. The Company had no remedy, for it could not sue the United States. So, the United States would have retained the lands, also have incurred the odium and disgrace of repudiation. That would have been barefaced confiscation; it is not less so by appellant's construction of the Act of 1929.

Appellant argues that "the *defenses* of acquiescence, waiver and estoppel were not available to the company" (p. 79). The statement is inaccurate. Waiver and estoppel are not, strictly speaking, "defenses" to forfeiture. Upon breach of condition subsequent, the grantor has an election to forfeit or accept performance. The remedies are inconsistent and alternative. We have shown in our brief filed last term that, with full knowledge and upon full debate and discussion, Congress deliberately elected not to declare a forfeiture. When it made its election, it thereupon lost its *right of forfeiture.* The United States, of course, is bound by the doctrine of election of remedies. *United States v. Oregon Lumber Co.,* 260 U. S. 290. So it is that appellant is not saying that waiver and estoppel are not *"available" to the company.* It really says that the right to forfeit for breach of condition subsequent, long ago lost, has been restored. The result, then, is that the United States, having received the benefit of performance by the company, is relieved from its own obligation of performance. If thus will have all the benefits of performance by the company and avoid delivery of the consideration therefor. To put the point in another way: Appellant does not really say that "defenses" of waiver and estoppel are abrogated by the Act; it really says that Congress has legislated to relieve the United States from the legal effect of *its own acts.* This is not to abolish a "defense". It is to create by legislative fiat a substantive right when none existed before. It is to alter legal rights arising from transactions closed for half a century.

(a) It is argued that the Act of 1929 in terms eliminates these "defenses" (p. 79). We have sufficiently dis-

cussed this point in our consideration of the scope and effect of the Act of 1929. There is not a syllable in the Act to support this statement. It is a mere ipse dixit.

(b) "That the defenses are inherently unavailable against a statutory contract" p. 82. The *Oregon & California R. R. Co. Cases*, 238 U. S. 393, and 243 U. S. 549, are cited. In those cases the Court held that the requirement of the grant that the lands be sold for $2.50 an acre was a continuing covenant having the force of law, not subject to waiver and estoppel. The distinction between the covenant in that grant and the one in the Northern Pacific grant of 1870 is vital. We refer to p. 121 of our original brief. The question now presented is whether the United States has waived breach of the condition subsequent contained in Sections 8 and 9 of the grant of 1864. On this point there is no need to repeat the argument contained in our opening brief, p. 35, et seq., 42 et seq. Appellant has made no effort to answer these arguments, and we find nothing in its present brief which requires further answer.

(c) (p. 85) "That essential elements of these defenses are lacking." This also is sufficiently discussed under the heading "Forfeiture", p. 24, et seq., of our original brief. We have quoted from the debates showing that Congress deliberately elected not to forfeit, whereupon the company proceeded with construction and completed the road at an expense of more than $100,000,000, has issued hundreds of millions of bonds which are in the hands of bona fide purchasers, has carried Government freight at a saving of more than $22,000,000 up to 1939, to which we take the liberty of adding that in 1939 land grant deductions amounted

to more than $2,000,000. In addition to the debates quoted in our opening brief, p. 24, et seq., we wish to refer to p. 89, quoting from a committee report to the 48th Congress (J. C. R. 206, 209) to the effect that no additional line should be built between Wallula and Portland. The report referred to the contract with the O. R. & N. and said:

> "We do not understand that the Northern Pacific is making any effort to construct their road to fill this gap. Indeed, there is no necessity for parelleling the line which they have leased."

Congressman Brent said:

> "The construction of the road between Wallula, Washington, and Portland, Oregon, is no longer required, and in all probability is not contemplated by the company for a long time to come. Another company, under the same general management, already has a road in operation over that portion of the line."

In the report of the Senate Committee on Public Lands, June 26, 1884, it is said that:

> "Every purpose of the Government is supplied in the construction of this section of 214 miles. There is no need for the construction of a parallel line to supply any demand of business either on the part of the Government or the general public."

It is a matter of history that at that time both the Northern Pacific and the O. R. & N. were under the management of Henry Villard. The construction of a parallel line would have been an economic crime, and Congress knew it. It would have been to waste the company's resources and an acquisition of public lands under the grant without any corresponding benefit to the United States.

(d) (p. 98) and (e) (p. 107) That even if these defenses were present, Congress "could constitutionally take them away." In the brief filed last term, appellant included res adjudicata as one of the "defenses" taken away. It now excludes res adjudicata. We have shown that the United States has brought more than 30 cases in this Court in which it was alleged and admitted, decided or assumed, that the company had performed its contract and was entitled to the lands. Finally, in the *Forest Reserve Case,* the Court said:

> "A third of a century already has elapsed since the company earned the right to receive what was intended by the grant."

Were there no other principle than res adjudicata, the company's rights would be secure.

Appellant asserts, p. 76, et seq., that the right to compensation conferred on the company *by the Act of 1929* was a "new *right*", as prior thereto there was no *"remedy"*. True, the company had no *remedy* because it could not sue the United States. But that circumstance did not detract in the least from the company's *right.* Appellant confuses right with remedy. Having prefaced and assumed that compensation was an act of grace derived solely from the Act of 1929, appellant asserts that waiver and estoppel are not available because the Act excludes them. We believe we have shown that the Act of 1929 does not make the company an outlaw. Appellant's entire argument rests upon a fallacy; namely, that the right to compensation was a *new right, conferred by the Act of 1929,* derived solely from that Act.

The fallacy is glaring and fundamental. The company's indemnity rights are *not* derived from the Act of 1929 but from the *grants* of 1864 and 1870. As this Court said in the *Forest Reserve Case,* p. 64:

> "The provision relating to indemnity lands was as much a part of the grant and contract as the one relating to land in place, *Payne v. Central Pacific Ry. Co.,* 255 U. S. 228; and it is apparent from the granting act and resolution that 'it was the purpose of Congress in making the grant to confer a substantial right to land within the indemnity limits in lieu of lands lost within the place limits.' *Weyerhaeuser v. Hoyt,* 219 U. S. 380, 387. Such rights are within the protection of the due process of law clause of the Constitution. *Sinking-Fund Cases,* 99 U. S. 700, 718."

The right to compensation is derived from the *Fifth Amendment,* not from the *Act of 1929.* Had that Act merely expropriated the lands, compensation would be implied. *Forest Reserve Case,* supra. In *Jacobs v. United States,* 290 U. S. 13, the question was whether just compensation required payment of interest on the value of the property. The Court said, p. 16:

> "The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. *It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment.*

> The suits were thus founded upon the Constitution of the United States." (Italics supplied.)

See also *Monongahela Navigation Co. v. United States*, supra; *Seaboard Air Line R. Co. v. United States*, 261 U. S. 299; *United States v. Rogers*, 255 U. S. 163; *Phelps v. United States*, 274 U. S. 341.

Appellant has confused *right* with *remedy*. Of course, there is no right to sue the sovereign without its consent. But the lack of a remedy, whether administrative or judicial, does not detract from the *right*. In *Lynch v. U. S.*, 292 U. S. 571, this Court held that the "Economy Act" of March 20, 1933, which repealed all laws relating to yearly renewable term insurance, was void under the Fifth Amendment. The Court said:

> "The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. *United States v. Central Pacific R. Co.*, 118 U. S. 235, 238; *United States v. Northern Pacific Ry. Co.*, 256 U. S. 51, 64, 67. When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals. (p. 579) * * * To abrogate contracts, in the attempt to lessen government expenditure, would not be the practice of economy, but an act of repudiation. 'The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as if would be if the repudiator had

been a State or a municipality or a citizen.' *Sinking Fund Cases,* 99 U. S. 700, 719." (580)

The Government contended that the repealing act, even if invalid, was effective to abolish the *remedy* on the policies. The Court held that it was not the intention of Congress to deny a remedy, the beneficiaries retaining their contractual rights. The Court pointed out that contracts between individuals are impaired within the meaning of the Constitution whenever the remedy is taken away or materially lessened, but that a different rule applies to the contracts of the sovereign. But the denial of a remedy, or the withdrawal of a remedy once given, does not detract in the least degree from the substantive right, for it might be honored through other departments of the Government. The Court said:

"Mere withdrawal of consent to sue on policies for yearly renewable term insurance would not imply repudiation. When the United States creates rights in individuals against itself, it is under no obligation to provide a remedy through the courts. * * * It may limit the individual to administrative remedies. * * * And withdrawal of all remedy, administrative as well as legal, would not necessarily imply repudiation. So long as the contractual obligation is recognized, Congress may direct its fulfillment without the interposition of either a court or an administrative tribunal." (p. 582)

We submit that appellant is wholly wrong in saying that the Act of 1929 gave a *right* to compensation, or a *"new right"*. On the contrary, appellee's rights are exactly the same as if that Act had never been passed.

But the Act of 1929, far from purporting to abrogate the company's substantive rights, recognized those rights, expropriated them in the exercise of the power of eminent domain, and provided for payment of just compensation judicially ascertained.

Atlantic and Pacific R. Co. v. Mingus, 165 U. S. 413, is a leading case on the right to forfeit for breach of condition subsequent. The action was ejectment by the railroad to recover a parcel of land claimed under its grant of July 27, 1866. Defendant alleged that the grant had been forfeited by the Act of July 6, 1886, 24 Stat. 123. By July 4, 1878, time fixed by the grant for completion, the company had constructed only 125 miles out of 2267. It alleged that due to the financial panic of 1873 and the failure of the United States to extinguish Indian titles, no substantial progress could be made with the road from 1871 until the beginning of 1880. On July 6, 1886, the company had about 1,228 miles of road in operation. On July 6, 1886, Congress passed an act forfeiting lands coterminous with uncompleted line. Validity of this act was the only question at issue. The Court held that, when the United States grants public lands upon condition subsequent, they have the same right to reenter for breach which a private grantor would have under the same circumstances, which right could be exercised by legislative act. But the company must be given an opportunity, in a judicial proceeding, to contest the grounds upon which the forfeiture is declared. The Court said, p. 434:

> "* * * while we think the practice of forfeiting by legislative act is too well settled to be now disturbed, we do not wish to be understood as saying that this power may be arbitrarily exercised, or that the grantee

may not set up, in defence any facts which he might lay before a jury in a judicial inquisition. It would comport neither with the dignity of the Government nor with the constitutional rights of the grantee, to hold that the Government by an arbitrary act might divest the latter of his title, when there had been no breach of the conditions subsequent, or when the Government itself had been manifestly in default in the performance of its stipulations. The inquiry in each case is a judicial one, whether there has been, upon either side, a failure to perform, and it makes but little practical difference whether such inquiry precedes or follows the reentry or act of forfeiture."

The language declaring the forfeiture of the Atlantic and Pacific grant is not, in legal effect, different from Section 2 of the Act of 1929. The above quotation from the Atlantic and Pacific case is as apt in its application to our Section 2 as to the Atlantic and Pacific Act. So, the determination must be judicial in both cases. The General Adjustment Act of 1887 would apply to any other land grant railroad, the Union Pacific, Kansas Pacific, Southern Pacific, etc. We suppose it is a matter of history that few, if any, land grant roads were constructed within time or constructed every mile authorized. Be that as it may, however, any action to forfeit any of those grants must be brought under the Act of 1887. Such action would be determined in accordance with established principles of law and equity. To say that the Northern Pacific, of all the land grant roads, has been outlawed is to say that the Act of 1929 is a legislative monstrosity, without precedent in this or any other civilized country.

A right or title established by waiver, estoppel, or res adjudicata is as good as any acquired by purchase, inheritance, or in any other way enumerated by Blackstone. If the United States can constitutionally relieve itself from the legal consequences of its own act of waiver or from estoppel by judgment, it can abolish the legal consequences of payment or not guilty. If Congress can not, as said in the *Sinking-Fund Cases,* supra, legislate back to itself the lands to which the company is entitled, certainly it can not do it indirectly by establishing a special rule for the particular case which will insure the result. Even if appellant were correct in treating res adjudicata, waiver, and estoppel as "defenses", they could not be abrogated by legislation, for

> "* * * what is apparently mere matter of remedy in some circumstances, in others, where it touches the substance of the controversy, becomes matter of right * * *. For it has been uniformly held that 'any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, *though professing to act only on the remedy,* is directly obnoxious to the prohibition of the Constitution.' *McCracken v. Hayward,* 2 How. 608, 612; *Cooley, Const. Lim.* 285. Hence it is that a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away. *A vested right to an existing defense is equally protected,* saving only those which are based on informalities not affecting substantial rights, which do not touch the substance of the contract and are not based on equity and justice.

Cooley, Const. Lim. 362-369." *Pritchard v. Norton,* 106 U. S. 124, 132.

Instances of those exceptions are cited in appellant's brief on reargument, p. 100, particularly *Paramino v. Marshall,* 309 U. S. 370. There the Court sustained a statute providing for reopening of a compensable claim where the injury developed after the hearing and award and was unknown until after the time fixed for submission to the board. Of this statute the Court said, p. 378:

> *"It does not operate to create new obligations where none existed before.* It is an act to cure a defect in administration developed in the handling of a compensable claim. If the continuing injury had been known during the period of compensation, payments of the same amount due under the award authorized by this act would have been due to the employee. In such circumstances we see no violation of the due process clause."

The United States is not a favorite of a court of justice. It is bound by settled principles of law and equity just as an individual. Some of the cases holding that the United States is bound by the doctrines of waiver, estoppel, res adjudicata under circumstances like those here presented are:

United States v. Stinson, 125 Fed. 907, 197 U. S. 200;
Dayton Airplane Co. v. United States, 21 F. 2d 673;
Reading Steel Casting Co. v. United States, 268 U. S. 186;
Pettigrew v. United States, 97 U. S. 385;
Fritch v. United States, 236 Fed. 133;

and especially

United States v. Winona, etc. R. Co., 165 U. S. 463;
Eastern Terminus Case, 95 Fed. 864, 177 U. S. 435;
Maryland Steel Co. v. United States, 235 U. S 451;
United States v. Denver & R. G. W. R. Co., 16 F. 2nd, 374.

That the United States is bound by res adjudicata, see
United States v. California & Oregon Land Co., 192 U. S. 355;
United States v. Moser, 266 U. S. 236.

The United States is also bound by the related doctrine of election of remedies. *United States v. Oregon Lumber Co.*, 260 U. S. 290.

We know of no Congressional precedent for the Act of 1929, as appellant construes it. But at an early date some state legislatures enacted special laws retrospectively affecting substantive rights, of which *Cooley, Const. Lim.* (8th ed. 1927, p. 809) said:

> "The legislature may suspend the operation of the general laws of the state; but when it does so the suspension must be general, and cannot be made for individual cases or for particular localities. * * * Everyone has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments."

Such an act cannot be a law because it is not legislative action. It is the province of a judgment or decree to decide a particular case, and the action is judicial, and comes after, and not before, the case arises, and after, not before, the parties have had a hearing. *Baggs's Appeal,* 43 Pa. 512.

In *Holden v. James,* 11 Mass, 396, the court said of such an act:

> "It is manifestly contrary to the first principles of civil liberty and natural justice, and to the spirit of our constitution and laws, that any one citizen should enjoy privileges and advantages which are denied to all others under like circumstances; or that anyone should be subjected to losses, damages, suits, or actions, from which all others, under like circumstances, are exempted." (403-4)

See also *Guy v. Hermance,* 5 Cal. 73.

In the leading case of *Monongahela Navigation Co. v. United States,* 148 U. S. 312, it was held that Congress cannot, in a particular case, prescribe the measure of just compensation for the expropriation of property, because that would be to exercise judicial power in a particular case. Much that is there said applies here.

Other cases holding that to legislate for a particular case is to exercise judicial power are *Roles Shingle Co. v. Bergerson,* 142 Ore. 131, 19 F. 2d 94; *Ervine's Appeal,* 16 Pa. 256.

Our answer to the second and third questions for reargument, therefore, is that the Act of 1929 does not accord to the parties any relief, give them any defenses, nor otherwise affect their *substantive rights* as they are and were by established principles of law and equity.

III. Certain Assignments of Error Insofar as Their Subject Matter Bears Upon the Nature and Extent of the Relief Accorded and Defenses Made Available to the Parties by Sections 1, 2, 5, and 6 of the Act of June 22, 1929.

A. *The assignments have only such bearing or effect upon the substantive rights of the parties as belong to them under established principles of law and equity.*

The order specifies for reargument certain assignments of error "with reference to the bearing of the matters comprehended in these assignments upon the nature and extent of the relief accorded, and the defenses made available, to the parties respectively, by Secs. 1, 2, 5, and 6 of said Act".

It follows from the position taken on subdivisions I and II, argued supra, that these assignments of error can have only such bearing or effect upon the *substantive rights* of the parties as belong to them by established principles of law and equity.

Therefore, we proceed to answer appellant's contentions on their merits.

B. *Failure to complete main line from Wallula to Portland.*

Appellant argues, p. 124 et seq., that the company's failure to complete the main line from Wallula to Portland relieves the United States of its obligation to convey the lands earned by *constructed* line. The argument is substantially the same as that made in the brief filed last term, p. 96 et seq. The point is answered in appellee's brief, p. 24 et seq., to which we can add nothing.

At p. 130, *G. T. W. R. Co. v. United States*, 252 U. S. 112, is cited. The case does not, of course, hold that the Government is entitled to land grant rates and to retain the lands which were the consideration for those rates. In the case cited, the company, or its predecessor, received all the lands available to satisfy the grants.

C. *Alleged breach of the preemption proviso.*

Appellant, p. 133 to p. 158, reargues the above subject. The point was argued in appellant's brief filed last term, p. 190, and answered by appellee, p. 121. See post, p. 77.

D. *1875 and 1896 Foreclosures.*

1. *Legal effect of 1875 foreclosure and deeds made pursuant to the plan of reorganization to revest title to the railroad and lands in the federal corporation, the Northern Pacific Railroad Company.*

Appellant, p. 158, argues that the foreclosure and sales of 1875 and 1896 were in violation of the preemption proviso of the Joint Resolution of 1870 because the lands were not sold by the trustees under the mortgage at public sale in single sections or subdivisions to the highest and best bidder. This point was made below and overruled. It was abandoned last term.

The 1875 foreclosure is discussed by the Master, R. 299. Bonds of some $30,000,000 were issued under the Jay Cooke mortgage of 1870. April 16, 1875, a foreclosure suit was

filed in the Circuit Court for the Southern District of New York, and a receiver appointed. On June 30, 1875, the bondholders adopted a plan of reorganization. Their committee purchased the railroad and lands at foreclosure sale. By the reorganization plan the new stock was $100,000,000, divided into $51,000,000 preferred and $49,000,000 common. The bonds, interest, and floating debt were retired with the preferred stock. The new common stock was exchanged share for share for the outstanding common stock. The preferred stock was given exclusive right of management and other privileges for a defined period. When the plan of reorganization should be carried out, the railroad and lands should be reconveyed by the bondholders' committee to the federal corporation, the Northern Pacific Railroad Company. The decree was duly entered May 12, 1875, ordering the sale of the railroad, lands, etc., which was executed August 12, 1875 and confirmed August 25, 1875. On September 17, 1875, the commissioners appointed to make the sale executed a deed to the committee of bondholders. On September 28, 1875, the receiver likewise made a deed, and on September 27, 1875, the trustees under the mortgage likewise conveyed. March 22, 1882, Johnston Livingston and others, comprising the purchasing committee, conveyed the railroad and lands to Northern Pacific Railroad Company, a corporation created and existing under the laws of the United States. These deeds were of "further assurance" of title.

The bill of complaint charged that the lands were not sold at public sale at places within the states and terri-

tories in which they were located and in single sections or subdivisions and that they were sold under collusive private sales to Frederick Billings, representing the committee of bondholders, for the benefit of the bondholders and stockholders of the company as reorganized. These charges apparently were intended by the pleader to be a predicate for the contention that the Northern Pacific Railroad Company, as reorganized, was not the federal corporation, but was some kind of organization, never defined or possible to be defined, which the pleader styles "Northern Pacific Railroad Company as reorganized in 1875". Apparently this theory has now been abandoned and the transaction diverted to support a charge that the sale was in violation of the preemption proviso of the Joint Resolution.

It is alleged that thereafter the reorganized company held itself out to be the corporation created by the Act of July 2, 1864, received patents to lands from the Government in the name of the Northern Pacific Railroad Company created by the Act of July 2, 1864, and that thereafter the "company as reorganized", but claiming to be the federal corporation, executed certain mortgages, some of which were foreclosed in 1893 in the Circuit Court for the Eastern District of Wisconsin, and as a consequence of that foreclosure the "Northern Pacific Railway Company, a Wisconsin corporation, succeeded by operation of law, or otherwise, to all rights, titles, interests, and obligations held either by the railroad company created by the Act of July 2, 1864, or the railroad company as reorganized under the plan of June 30, 1875."

The allegations are accompanied by charges of fraud, collusion, breach of the charter, approbrious epithets lib-

erally used to characterize the transaction. The Master held: First, that the 1875 foreclosure was valid and operated to pass the railroad and lands to the committee of bondholders, and that the conveyances above described revested the property in the Northern Pacific Railroad Company, the federal corporation, and that said company, and none other, thereafter completed the railroad and became entitled to the lands earned thereby, R. 306.

2. *Appellant is estopped to say that the Northern Pacific Railroad Company did not perform its contract and earn the lands, and that the Northern Pacific Railway Company did not succeed to the rights of the Railroad Company.*

The Master said, R. 307, that though some of the restrictions placed upon the common stock were probably invalid as against the common stockholders, they had consented and all parties in interest had consented, and no one was injured; that, though the United States might have corrected the irregularities by proper proceedings, it did not do so; that, on the contrary, it acquiesced for some 60 years in all that had been done; that, during all that period, the United States, through every department, executive, legislative, and judicial, had recognized the Northern Pacific Railroad Company as validly existing under the charter granted by Congress, and as validly exercising the franchise and operating the railroad, and "entitled to receive the lands granted to it and which were being patented to it or certified for patent as each successive twenty-five-mile section was finished and accepted."

The Master said that the United States was fully informed of every step taken in the foreclosure and reorgan-

ization, citing the annual reports of the company to the Secretary of the Interior and the Auditor and Commissioner of Railroads, which gave full details and particulars of the transactions (Reports of the Commissioner of Railroads for 1881, p. 183, and for 1882, p. 244).

The matter was before Congress after 1875, as shown by Government exhibits 50-54 inclusive, and Congress was placed in possession of complete information. The Master said, R. 309, of the reorganization of 1875 that only by such a proceeding could the company have completed the railroad; that it was both right and wise for the United States to approve and acquiesce in what was done. At R. 310 the Master said:

> "How was the Government thereby injured, or the people of the United States, or for that matter, how could any human being conceivably have been wronged by it? The only persons having any possible interest to object were satisfied. Why should any person else have objected? * * * In exactly eight years thereafter the road was built, and has ever since been operated with all advantages resulting, not only to the Government as such, but to all the people of the nation. In exactly fifteen years from the reorganization four great states were admitted to the Union, and men from all of them entered into high places in this Government, achieving distinction."

The Master said, R. 313, that the legal effect of the 1875 proceedings was that the committee of bondholders, acting for themselves, the stockholders, creditors, and all concerned, purchased under the plan, took title as naked trustees, and, upon reconveyance, all the railroad and lands revested in the railroad company, and thereafter that

company, the corporation created by the Act of July 2, 1864, regained the property and was as fully invested with title thereto as if the foreclosure and reorganization had never occurred. The Master said, R. 313:

> "All the conveyances made to the committee by which they got their title were made to them in express terms as a committee of bondholders under the plan of reorganization. The committee never claimed to have title in any other capacity. By the very terms of that plan the committee were to purchase for the benefit of all parties complying with the plan. It is obvious, therefore, that they took title in trust. Nothing but the bare, legal title ever passed to them. The beneficial interest remained elsewhere. They held in trust, first, to cause preferred stock to be issued to the bondholders in exchange for their bonds; second, to cause common stock to be issued to the stockholders in exchange for the common stock previously held by them; third, to assume the management of the property, and after causing the issuance of the stock and bonds contemplated, to place the railroad and property again under the control of a board of directors to be elected by the preferred stockholders. I think the plain construction of that language, the plain intent of the plan and the plain purpose and effect of what they did do thereafter was that the beneficial interest in the property at all times continued to remain in the Northern Pacific Railroad Company, and the naked title only in the committee. The beneficial interest certainly did not pass to the committee and it must have remained somewhere."

At or about the same time, the 838,852 acres said to have been collusively sold to Frederick Billings, as representative of the bondholders' committee, was also reconveyed to the Northern Pacific Railroad Company. The Master's conclusion was that the demurrer should be sustained to this

subdivision, and that the pleas of waiver and estoppel should be sustained. We understand that appellant does not even question that the pleas of waiver and estoppel should be sustained if those defenses are available, a point which we have answered in another place in this brief and need not repeat.

On January 29, 1897, the Secretary of the Interior asked the Attorney General for an opinion as to the right of the Northern Pacific Railway Company to receive patents as the successor in interest of the Northern Pacific Railroad Company. Attorney General Harmon, in an opinion dated February 6, 1897, 21 Opinions of Attorneys General 486, ruled that the Railroad Company, having completed and put in operation the railroad and telegraph lines authorized by the Act of July 2, 1864, and the conditions mentioned in said Act having been fully performed, the right to patents was perfected in said company; and that, by the foreclosure of the mortgage authorized by Congress, all the rights, property, franchises, and land grants had passed to the Railway Company. November 21, 1899, Secretary Hitchcock, in an opinion prepared by Assistant Attorney General Van Devanter, advised the Commissioner of the General Land Office to correct his regulations

> "so as to recognize the Northern Pacific Railway Company as the lawful successor in interest as to all the lands within the limits of the grant provided for in the acts making grants to the Northern Pacific Railroad Company." (29 L. D. 316, 317)

December 26, 1899, Acting Secretary Ryan, in an opinion prepared by Assistant Attorney General Van Devanter, ad-

vised the Commissioner of the General Land Office, at the request of the Northern Pacific Railway Company

> "that all lists submitted for the approval of this Department, on account of the grant to the Northern Pacific Railroad Company, as well as the patents to be issued thereon, be in the name of the Northern Pacific Railway Company, as successor to the Northern Pacific Railroad Company." (29 L. D. 387, 388)

The objections made by appellant were later brought to the attention of the Attorney General. April 12, 1905, Attorney General Moody reviewed Attorney General Harmon's opinion, and, upon full consideration and with full knowledge of everything asserted by appellant, upheld the reorganization, foreclosure, and sale to the bondholders in 1875, the subsequent proceedings therein, the mortgages thereafter made, foreclosed in 1896, and succession of the Railway Company to all the rights granted to the Railroad Company by the Act of 1864 and Joint Resolution of 1870, 25 Opinions of Atty. Gen. 401. We suggest that the Court examine these opinions. Certainly, if a question can ever be deemed settled, the performance by the Railroad Company of its contract, by which it earned its grant, and the succession of the Railway Company to the rights of the Railroad Company were laid to rest by the last generation.

Appellant's criticisms of the foreclosure were called to the attention of Congress many years ago and resolutions for investigations were introduced, but no action was taken. The Master said:

> "Moreover, the views expressed by the several Attorneys General and recognized by the Department was taken by the Government in the cases pleaded as res judicata by the allegations of the complaint in the several cases.

> I think that by all these things through many years the Government has elected to waive any right it might have ever had of objecting to the foreclosure proceedings or to the sales of land thereunder. Indeed, in this very case, the Government is seeking between itself and the railway company an adjustment of the grant. Of necessary consequences, this is a direct recognition and intentional acquiescence in the ownership of these lands by the Northern Pacific Railway Company. I hold, therefore, that the plea of estoppel should be sustained. R. 382, 383.

E. *Preemption proviso of the Joint Resolution of 1870.*

Whatever plausibility, if any, appellant's contention may have is based upon three erroneous assumptions in support of which argument is not even attempted: first, that the lands had to be sold on foreclosure to *third* persons; second, that the preemption proviso applies to the land granted by the *Act of 1864* as well as to that granted by the Joint Resolution of 1870; and third, that authority to mortgage the *land* was conferred by the Joint Resolution of 1870 and so subject to the conditions thereby imposed. These assumptions are incorrect. The preemption proviso of the 1870 grant is as follows: (16 Stat. 378)

> "That all lands *hereby granted* to said company, which shall not be sold or disposed of, or remain subject to the mortgage by this Act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and preemption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre; and if the mortgage hereby authorized shall at any time be enforced by foreclosure or other legal proceeding, or the mortgaged lands *hereby granted*, or any of them,

be sold by the trustees to whom such mortgage may be executed, either at its maturity or for any failure or default of said company under the terms thereof, such lands shall be sold at public sale, at places within the States and Territories in which they shall be situate, after not less than sixty days previous notice, in single sections or subdivisions thereof, to the highest and best bidder * * *."

1. *There is no requirement in the preemption proviso of the Joint Resolution of 1870 that the foreclosure sales be to third persons.*

There is no requirement that the lands be sold to *third persons.* This contention never was made until this suit was filed. The Master, R. 381, answers this contention. Referring to the purchase of the lands and railroad at the 1896 foreclosure by surrendering the bonds of the railroad company, he said:

"It has, however, never been suggested that there was anything wrong or oppressive in such a practice. It should be remembered here that the grant to the railroad company, far from exhausted in 1896, was an essential and integral part of the system. That these lands were necessary to the railway company as security for its contemplated new mortgages. *There is no language in the Joint Resolution requiring the sales to be to third persons.* There is no reason, either in public policy or in required construction of the language, to give it that interpretation. The provision in terms is that the lands should be sold at public auction at places within the states and territories where situate after not less than sixty days' previous notice, in single sections or subdivisions to the highest and best bidders. There is no inhibition expressed or implied, that

> I can see, against any organization, intending to acquire the road and its lands and to operate them as a continued whole, becoming a bidder and purchaser. If such an organization upon the sales offered the highest and best bid it was within the terms of the proviso."

The Master observed that the Government could not now set aside the sales, nor does it seek to do so, but only says that

> in consequence of such action the hands of the railway company in this court are not clean within the equitable maxim, and in consequence, on final adjustment of the grant, there should be lost to the railway company some portion of its grant earned by its predecessor. Such an effect is not possible. I do not think there was anything wrong in the purchase of the lands in the manner alleged."

These considerations were sufficiently convincing that appellant abandoned the argument at the last term. Now it brings it forward again.

The Master shows, R. 379, 380, that the reorganization has been recognized as valid by this Court in *Northern Pacific Railway Co. v. Boyd*, 228 U. S. 482, subject only to the rights of unsecured creditors. The Master said, R. 380:

> "It would be intolerable to announce the doctrine that the bondholders and stockholders of a corporation like the Northern Pacific could not protect themselves by reorganization in times of financial stress and inability of the company to continue. I think it would be contrary to public policy to hold such a doctrine."

The bill, paragraph XVIII, R. 28, objects to the foreclosure only on the ground that the sale was to the Northern Pacific Railway Company, not to third persons. The

bill distinctly does not allege that the sale was not in single sections or subdivisions to the highest and best bidder, at places in the states or territories wherein the lands were situate. That the sales were so made was established by the evidence taken in support of the pleas of waiver, estoppel, and res adjudicata, and has never been questioned. Paragraph III of the decree finds that the foreclosure of 1896 and the deeds issued pursuant thereto (R. 641):

> "were valid and in accordance with the requirements of said Joint Resolution with respect to the disposition of said granted lands, and the decree of said Circuit Court for the Eastern District of Wisconsin in said cause, dated April 27, 1899, as amended May 25, 1899, directing the public sales of all remaining lands in Minnesota and North Dakota east of the Missouri River and rights to lands and all other remaining assets; the sales of said remaining lands, rights to lands, and assets, to Northern Pacific Railway Company, and the decree of confirmation of said sale, entered by said court, dated September 16, 1899, were valid and in accordance with the requirements of said Joint Resolution; that by said foreclosure proceedings and said decrees confirming said sales and by sundry deeds of conveyance for further assurance of title from Northern Pacific Railroad Company to Northern Pacific Railway Company, from Alfred L. Carey, Special Master, to Northern Pacific Railway Company, from the receivers of said Northern Pacific Railroad Company to Northern Pacific Railway Company, and from the trustees under said mortgages to Northern Pacific Railway Company, said Railway Company became and is the successor in interest to Northern Pacific Railroad Company and the owner of all land-grant lands of said Railroad Company, the right to receive additional lands and all other rights pertaining to said Railroad

> Company under said Act of July 2, 1864, and Joint Resolution of May 31, 1870, including the right to receive unpatented lands and just compensation for withdrawn lands, and all other rights as provided by the Act of Congress of June 25, 1929."

Because appellant took no exception to the Court's finding that the sales were made to the highest and best bidder at places in the states and territories wherein they were situate, we think we are right in supposing that appellant contends only that the lands were not sold to *third persons*, and otherwise makes no contentions regarding the sales. Certainly there was no basis in the evidence for the contention that the lands were not sold in single sections or subdivisions to the highest and best bidder in the states wherein they were located. See C. W. Bunn's testimony, R. 719.

2. *The proviso applies only to the lands granted by the Joint Resolution of 1870.*

The proviso applies only to the lands "hereby granted". That is, granted by the Joint Resolution of 1870, not by the Act of 1864. Appellant assumes that the proviso applies to all the lands. The $2.50 proviso was discussed in appellees' brief last term, pp. 121-126, to which we refer. The Master, R. 372, said:

> "The opening phrase—'That all lands hereby granted' is said to include as well lands theretofore granted by the Act of July 2, 1864. I can see no reason why these words should not be given their direct and natural import. I think the phrase means precisely what it says. It certainly requires much ingenuity to put

into the language 'hereby granted' a meaning covering all lands theretofore granted. By the Resolution a distinct and additional grant of lands was made to aid in the construction of a then thereby authorized line from Portland to Puget Sound. The authority to build that line had its origin solely in the Resolution. It was not authorized by the Act of July 2, 1864. I have endeavored to follow the detailed and somewhat refined reasoning of counsel on both sides. But to me it seems a simple question. The Resolution authorizing the building of a line between Portland and Puget Sound and granting lands in aid thereof, then enacts: 'Provided, that all lands hereby granted' shall be subject to certain conditions; and to me, at least, it is clear that those conditions relate to the lands thereby granted and to none other."

The Master observed that the legislative history of the proviso conclusively shows that it was not intended to apply to the 1864 grant, even if it constitutionally could. The debates were before the Master and will be found in Congressional Globe, Forty-first Congress, 2nd Session, pp. 1097, 1477, 1584, 1624, 2480, 2539, 2569, 2833, 2867, and 3365. We print them in Appendix. Amendments requiring sales to actual settlers and in quantities not greater than 160 acres to any one person, at $2.50 per acre, were offered and rejected, as well as amendments to make the preemption proviso applicable to the grant of 1864. Senator Wilson said in this connection:

"I move to strike out in the amendment the words 'heretofore or', so that the terms of the amendment of the Senator from Ohio will apply only to so much of the lands as is granted by this resolution, and will not interfere with the original grant. I do not wish to take anything of that grant away."

Senator Wilson's motion prevailed.

If there were any ambiguity in the meaning of the proviso, the legislative history demonstrates that the intention of Congress was to confine it to the lands granted by the 1870 Resolution, that Congress refused to insert a covenant like that in the Oregon and California grant, requiring sales to actual settlers at $2.50 per acre; and that Congress deliberately refused to make the mortgages subordinate to the right of settlers. In *Platt v. Union Pacific*, 99 U. S. 48, construing a similar preemption proviso in the Union Pacific grant, the Court answered appellant's argument with respect to the company's right of disposition after it had earned the lands by constructed line. The Court said of the Union Pacific grant:

> "No limitation was set to the quantity of land which the company might sell to single associations, or single persons. It was left at liberty to sell, if it could, to any land association or private purchaser, the entire body of the lands or any lesser quantity, regardless of the general legislative policy." (p. 65)

The Court further said:

> "The provision that at the expiration of three years from the completion of the road the unsold or undisposed-of lands should be open to pre-emption, was in its nature not one to be 'strictly and faithfully carried out and fulfilled' by the company. The right to pre-emption of whatever might be left for pre-emption was a matter with which the company had nothing to do,—in relation to which they had no duties to perform, and only a right to the price paid by the pre-emptor." (p. 63)

There is no allegation that the company ever interfered with the preemption rights of settlers, if they had any, except that the company did deny those rights, and the Land Department, in the *Heath Case*, sustained its position. *Heath v. Northern Pacific Railway Co.*, 38 L. D. 77. Certainly no one is to be criticized for submitting his rights to adjudication. Since the decision of the Land Department, the company's position was accepted by all, the Government as well as settlers, and has not been questioned for a generation, nor until this suit was filed.

3. *The Joint Resolution does not restrict the power to mortgage lands granted by the Act of 1864.*

It is assumed that authority to mortgage the lands was conferred by the Joint Resolution of 1870 and subject to the preemption proviso. This point is argued appellee's brief last term, p. 127. Section 3 of the Act of July 2, 1864, makes a grant upon conditions stated, and those only. Among them there is no prohibition of a mortgage. On the contrary, it was contemplated that sales of the land should be made to aid in construction, and that included the lesser power to mortgage. Section 10 of the Act of 1864 is specific in forbidding a mortgage "by the said company on said *road*". This language, by implication, authorized a mortgage on the *lands*. When the Joint Resolution provided that if the mortgage thereby authorized shall be foreclosed or "the mortgaged lands hereby granted, or any of them, be sold by the trustees * * * such lands shall be sold at public sale," etc., it is impossible to read into the grants a requirement that any lands except those granted by the

Joint Resolution of 1870 shall be subject to the proviso. Otherwise the Joint Resolution would be given retroactive effect and would impair the contract evidenced by the Act of 1864 and, as shown, would do violence to the plain language of the Resolution. To prove how unsubstantial is the Government's position, let it be supposed that mortgages had been made and foreclosed prior to 1870. Would it be possible to say the preemption proviso of the grant of 1870 would apply?

4. *Validity of foreclosure sales and succession of Northern Pacific Railway Company to lands and rights of Northern Pacific Railroad Company are res adjudicata.*

The Master's ruling on the plea of res adjudicata is found R. 381 et seq. He said:

"The defendant pleads that the validity of these proceedings is res judicata. I have already ruled that such a plea cannot go in bar of the action, but that it is evidential and must be offered at the final hearing. Therefore, the plea must be overruled. But as your Honor may take a different view of it I will state precisely what is claimed under it and my views as to the effect of it.

"The Portland Over-lap case, 193 U. S. 1 (N. P. Exhibit 20) is pleaded. It is said that the United States alleged in that case and depended upon the validity of the foreclosure and sales, and that the defense of the Railway Company, and its claim to the land in suit likewise depended upon the validity of those proceedings, and that, therefore, of necessity the validity was, in fact and in law, adjudged by the Court. I think no other effect can be given to it. So, also, as to the

Yakima Indian Reservation case, 227 U. S. 355 (N. P. Exhibit 21) and the Forest Reserve case, 256 U. S. 51 (N. P. Exhibit 22).

"I think, as counsel said in argument, that the Supreme Court stated only a perfectly well known and well settled and adjudicated fact when it said in the Forest Reserve case: 'The rights and obligations of the original railroad arising out of the grant have long since passed to the present railway company and there is no need here for distinguishing one company from the other.' It is impossible to regard these cases in any other light than as a distinct and direct adjudication of the effect of the foreclosure and reorganization proceedings of 1896. If the plea is available to the defendants at this stage of the proceedings I think it should be sustained."

At the hearing on the merits the records in these cases were offered in evidence, R. 666, 667. This met the Master's view so we need not consider whether he was right in his ruling on the demurrer.

5. *Appellant's contention that only one mortgage was authorized can not be sustained* (p. 152).

The argument that the Joint Resolution authorized only one mortgage, which was foreclosed, and that thereafter the lands were subject to preemption is answered by the Master, R. 374, to which nothing need be added. Furthermore, as the Master shows, R. 381 et seq., the validity of the mortgages issued after the reorganization of 1875 and foreclosed in 1896, when the Northern Pacific Railway Company purchased the property, has long been res adjudicata by the decisions of this Court in the *Portland Over-*

lap Case, 193 U. S. 1, and the *Yakima Indian Reservation Case,* 227 U. S. 355, and other cases above cited. The Master also held, R. 382, that the United States is estopped to allege that the mortgages were invalid, or to deny the title of the railway company.

F. *Survey Fees.*

It is said that the company was in default with respect to payment of survey fees, and that the delay in surveys and patents was due to this circumstance. While this has no materiality, we wish to enter denial that the company refused or delayed to pay survey fees after decision of *Northern Pacific Railroad Company v. Traill County,* 115 U. S. 600, holding that it might be required to do so. The charge that the company wished to delay patents so that it could avoid payment of taxes has been gossipped, but is wholly without basis. The company had at all times on deposit with the Secretary of the Interior funds with which to pay survey fees, but the United States, whether through fault or neglect or otherwise, did not make the surveys. Master's Second Report, R. 429. To charge that the Company sought to delay the surveys is to say that it wished to lose the indemnity lands to settlers, whose rights were superior to the company's until survey. No one but the company stood to lose by delay in surveys.

G. *Alleged illegal disposition of capital stock and dissipation of assets* (p. 174).

Appellant urges as a breach of contract entitling it to forfeit the indemnity rights that the company, between date of organization and 1875, issued its capital stock without consideration; that thereby it withdrew the stock from public subscription and disabled itself from completing the railroad; that the company conveyed certain lands after the reorganization of 1875 in consideration of surrender of preferred stock (Subd. XII, R. 21); that the railroad company dissipated its funds in the construction of branch lines under a collusive and fraudulent contract with the Oregon and Transcontinental Company. By such unlawful dissipation of its assets, it is claimed that the company disabled itself from constructing its line within time. These points were not made last term. The Master disposes of the claim of illegal disposition of stock (R. 289) and of the branch line construction (R. 385). The stock transaction is known as the "original interests agreement". It was the Master's view that the allegations of Subdivisions VII and VIII amount only to charges of irregularities in the exercise of corporate powers which could have been objected to by stockholders and perhaps by the United States under its visitorial power. But, said the Master (R. 298):

> "* * * it is equally obvious that in no way did (these transactions) affect or impair the corporate existence of the railroad company or its right to exercise its corporate franchises. It is obvious, too, that these charges, whatever their legal effect might otherwise be, have no relevancy whatever to the land-grant provisions of the Act."

The Master also held that the principle of legislative recognition, discussed in appellees' brief last term p. 19, applies with full force to these charges. The United States, with full knowledge, has waived all rights, if any, it ever had. To this may be added that the company did complete the railroad and telegraph line and it was accepted, patents issued, and the company has been carrying Government freight for more than half a century.

The same observations apply to Subdivision XIV, relating to construction of branch lines under the contract with the Oregon and Transcontinental Company, by means of which the railroad is alleged to have been defrauded and its assets diverted. (See Master's Report, R. 385.) As to that the Master further observed that these contracts are not now in existence, and it is not alleged that anything illegal is now being done under them or has been for more than half a century. Obviously, they have no relevancy to adjustment of the grant, or any other question arising under the Act of 1929.

Appellant argues that it was the intention that the lands should be used to build the charter line; that in consequence of the illegal diversion of funds the company did not build the line from Wallula to Portland. But it is admitted that the United States did accept and convey lands for all the road that *was constructed*, and that the grant for the line between Wallula and Portland was forfeited by the Act of September 29, 1890 (26 Stat. 496). The United States thereby declared such forfeiture as it wished or was entitled to. The United States, of course, knew all about the disposition of stock; knew that the public would not subscribe; and accordingly the Joint Resolution of 1870

was passed authorizing mortgages with the proceeds of which the line was built. All this information is contained in the reports of the Commissioner of Railroads for 1882 at p. 42, in the 1883 report and in the 1884 report at p. 99. However, it certainly does not follow that the Northern Pacific would have built the line from Wallula to Portland with the moneys used to build branch lines. The fact is that the Wallula-Portland line was not built because the O. R. & N. had already built between those points, was under the same management as the Northern Pacific, and it would have been a waste of funds and an appropriation of public lands without benefit to the United States to duplicate those facilities. This also was known to Congress, as shown by the debates quoted supra, p. 19. The alleged unlawful disposition of lands is answered by the obvious statement that there is no requirement in the Act of July 2, 1864, or Joint Resolution of 1870 as to disposition of *earned* lands. It occurred to the Master and Court, as it does to us, that these charges amount to mere brutum fulmen, resurrected after the lapse of more than half a century to serve as an additional pretext for depriving appellee of the lands which it has *actually earned by construction of line and performance of its obligation to carry the Government freight.*

United States v. Union Pacific, 98 U. S. 569, is a complete answer to the charges of unlawful disposition of capital stock and diversion of assets. In that case, p. 607, it appears that identical allegations were made, namely, that the company disposed of the capital stock without consideration, that other property was disposed of unlawfully and contrary to equity; that the company was de-

frauded in construction contracts, etc. These wrongs and injuries the United States sought to correct in an action against the company and those charged with wrongdoing. The Court held that only the company had a cause of action therefor, and said (p. 611):

> "The truth is that the persons who were actually defrauded by these transactions, if any such there be, were the few bona fide stockholders who took no part in them and had no interest in the fraudulent contracts. But it is not alleged that there are such. If there be, they are not made parties to this bill, nor does it provide any relief for them. Yet a moment's consideration will show that they alone (to say nothing of the complainant for the present) suffered any legal injury or are entitled to any relief."

It is rather strange that the Government should, after the lapse of three-quarters of a century, complain that the stock was not sold to the public. Passing the thought that it was offered to the public and the public would not subscribe, this record shows that if the public had subscribed it would have lost a large part, if not the whole, of its investment within a very few years. We submit that appellant was better advised in brief filed last term for having abandoned these contentions, for certainly it is difficult to imagine any allegations that are more irrelevant to an adjustment of the grant, payment of just compensation, or any other purpose of the Act of 1929.

H. *Mineral Classification* (p. 184).

Argued p. 59 of appellees' brief last term.

It is now urged that the alleged fraud is a breach of the company's contract which disentitles it to compensation. Appellant's argument seems to be based upon the assertion that the company is plaintiff and must rely on its own fraud. The matter, in its true aspect, is much confused and misunderstood by appellant. It may help to restate the facts.

There were classified mineral under the Act of 1895 3,782,377.90 acres within the place limits, for which indemnity of 1,330,762 acres has been received, leaving 2,451,615 acres for which indemnity is still due. There were also classified mineral 1,187,740 acres in indemnity limits that were a total loss as no indemnity is provided. The United States has placed in the forest reserves 2,894,823 acres of place lands classified mineral, has disposed of an additional 65,155 acres under the mineral laws and 455,040 under the general land laws, R. 693, and has received from sales of timber taken from place lands classified mineral $1,365,979. It also retains the 1,187,740 acres of indemnity lands classified mineral. The company has disposed of most, if not all, of the indemnity lands it received. Appellant had complete knowledge, gained after full investigation, of all particulars of the classification as early as 1908; *elected to affirm and abide by the classification;* and retains in the reserves the lands classified mineral, both place and indemnity, as well as proceeds of sales and large sums received from sales of timber. In short, the Government retains everything it received under the classification, *and is adamant in its re-*

fusal to disturb the status quo so far as it is concerned. On the other hand, it asks also to retain the indemnity lands to which the company is entitled in consequence of the loss of place lands which the United States received and retains. That is to say, the United States affirms the classification so far as it benefited and repudiates the classification so far as it imposes an obligation. A more flagrant, inequitable, and indefensible contention cannot be conceived. It is elementary that the United States had to elect to repudiate or affirm the classification. It could not do both. It has elected to affirm and is bound by its choice. *United States v. Oregon Lumber Co.*, 260 U. S. 290. How can any litigant assert a fraud—either as ground for relief on its own part or as a bar to relief for its adversary—if it has elected to ratify the fraudulent act and retain its benefits?

1. *Whether the United States is plaintiff or, as contended by appellant, the company is plaintiff, is immaterial. The company is entitled to just compensation regardless of the form of the action or whether it is plaintiff or defendant.*

Appellant argues, p. 186, et seq., that in some mysterious way defendants have become plaintiffs, and plaintiff defendant. The United States brought this suit, as directed by the Act, to adjust the grants and ascertain and pay just compensation. If it had not done that, the Secretary of the Interior would have made the adjustment and the lands would have been conveyed to the company. The argument seems to us a mere juggling with words. The com-

pany is entitled to recover just compensation for expropriation, and the form of the action makes no difference. *Jacobs v. U. S.*, 290 U. S. 13, is a complete answer to appellant's argument. The suits were by the owners against the United States. The Court said, p. 16:

> "The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. *The fact that condemnation proceedings were not instituted and the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right.*"

I. *Unauthorized Withdrawals* (p. 204).

This point, made below, was abandoned last term. In *Nelson v. Northern Pacific R. Co.*, 188 U. S. 108, the majority held that filing of the map of *general route* under Section 6 of the Act of 1864 did not operate to protect place lands from settlers. That was the opinion of the Secretary of the Interior. Accordingly, upon filing such maps, he withdrew the land from settlement or preemption. The company always relied on its maps of general route. In the *Nelson Case* the practice was overthrown, and it was held that a settler on granted lands prior to filing map of definite location, though subsequent to filing map of general route, was entitled to the land. Prior to this decision it is doubtless true that the company was protected, as it and the Secretary of the Interior believed it had a right to be, by the filing of the map of general route. It was likewise believed by all concerned that upon definite location the

Secretary was required to withdraw the odd-numbered sections within the *indemnity* limits. Such withdrawals were held unauthorized in *Hewitt v. Schulz,* 180 U. S. 139. Appellant now claims relief because the company received some lands it might not have received because they might have been taken by settlers if not illegally withdrawn, and alleges that the quantity of such lands amounts to an undefined and undefinable millions of acres. So large is the acreage alleged to have been improperly received by the company that, without it, the road could not have been constructed at all. The Master discusses this point R. 368. It was his view that the erroneous construction of the grant by officials of the Government could not prejudice the rights of the railroad company, for it is not alleged that the withdrawals were procured by fraud or at the company's solicitations. Neither was the Government injured, for the company did not receive any lands to which it was not entitled. If it had not received the place lands it must have received indemnity lands, and if the indemnity limits were depleted, they would have had to be enlarged, as they were enlarged in 1870. Without the land grant it is admitted by all that the road could not have been constructed. Nor, in any view, can these withdrawals have any relevancy to adjustment of the grant. The adjustment involves only determination of; first, the measure of the grant; second, acres received; and, third, whether the company had earned them. Appellant has received full credit for all lands patented to the company, whether improperly withdrawn or not. The argument at p. 205 that had the withdrawals not been made, many of the lands would have gone to settlers and the United

States would have been compensated by them, is without point because the company must have received other lands to make up the measure of the grant. Under settled principles of equity the United States cannot now set up its mistake in the matter of withdrawals. The company could and, it must be presumed, would have filed its map of definite location at the time it filed its map of general route. The company was misled by the mistake of the United States. On this state of facts, the United States is in the position of saying that its own mistake operated not only to deprive the company of the lands it received, but as well those it would have received but for the mistake. No court of equity will aid to bring about that result. In *United States v. Winona, etc. R. Co.*, 165 U. S. 463, (an action under the General Adjustment Act of March 3, 1887) the suit was to cancel patents to lands alleged to have been granted to the State of Minnesota for the benefit of the railroad company by mistake. The Court said (p. 482):

> "* * * that it does not appear from this record either that the railroad company received an excess of lands or has even received (these lands included) the full quantity of lands promised in the grant; and further, that it does not appear that there were not within the granted or indemnity limits lands which the company might have rightfully received but for this erroneous certification. It will hardly be contended that, if, simply through a mistake of the land department, these lands were certified when at the time other lands were open to certification which could rightfully have been certified and which have since been disposed of by the Government to other parties, so that there is now no way of filling the grant; the

Government can nevertheless recover the value of the lands so erroneously certified. *In other words, the mistake of the officers of the Government cannot be both potent to prevent the railroad company obtaining its full quota of lands, and at the same time potent to enable the Government to recover from the company the value of lands erroneously certified.*" (Italics supplied)

Of course, in addition to this, it is not known and can never be known what, if any, lands would have been taken by settlers during the period of unauthorized withdrawal. Those withdrawals occurred more than half a century since and there is probably not now alive a single bona fide preemptor or intending purchaser who would have taken the lands. The utter impossibility of proof of loss to appellant arising out of transactions closed more than 50 years ago is apparent. The mistake has been known ever since the decisions in the *Nelson* and *Hewitt Cases*. If the United States had a cause of action therefor it remained for a succeeding generation of officials and lawyers to discover it.

Mount Rainier Park Exchange Act (p. 215).

This point will be submitted on the Master's Report, R. 329.

J. *Unsurveyed lands and lands restored to the public domain after withdrawal.*

Appellant argues, p. 227 et seq. 234 et seq., that unsurveyed lands and lands restored to the public domain

after withdrawal must be counted to determine whether there was a deficiency in the grant at date of withdrawal. The *Forest Reserve Case* is a sufficient answer to this contention. The subject is argued in appellee's brief last term, p. 139, 141, et seq. Summary is as follows:

(a) The question is moot as respects first indemnity limits of the grant of 1864 for there was a continuing deficit of 738,922.84 acres if both surveyed and unsurveyed lands be counted.

(b) The question is also moot with respect to second indemnity limits of Montana, because there was a continuing deficit of 175,292.80 acres, counting both surveyed and unsurveyed lands.

(c) The question is material only with respect to 23,364 acres in Idaho, second limits.

(d) Unsurveyed lands were not available and can not be counted because they might have been lost to settlers prior to survey and so the company might never have obtained a single acre.

(e) The Secretary of the Interior would not accept selections of indemnity lands prior to survey, nor would he accept selections of withdrawn lands either before or after survey, and, therefore, such lands were not available for selection and can not be counted.

(f) The point has been decided by the Forest Reserve Case, as shown by the quotation pp. 144-5 of appellees' brief last term.

(g) The United States Land Office has consistently ruled that unsurveyed lands are not available for selection by the company. Brief last term, p. 149.

(h) The indemnity lands cannot possibly be available for selection before survey because prior to survey the odd sections have not been identified and do not exist. Brief last term, p. 150.

A further answer to the contention is that, not only might such lands be taken by settlers before survey and so lost to the company, but the Government might, and did, withdraw those lands and place them in reserves before survey. Thereupon the Secretary invariably held, prior to the *Forest Reserve Case,* that the lands were not available for selection, even though afterwards surveyed. The company repeatedly attempted to select such lands, but its selections were refused. Acceptance of such selection was claimed by the Government in the *Forest Reserve Case* to have been an error. The effort to cancel such selection and patent led to the *Forest Reserve Case.*

K. *Idaho Withdrawals.*

At p. 224 appellant repeats the statements concerning the Idaho withdrawals, the error of which is pointed out at page 154 of appellee's brief last term. We repeat and emphasize our objection to the injection on appeal of contentions not made below and therefore not passed upon by the Master. Appellant's insistent use of erroneous figures in connection with this subject emphasizes the importance of the rule that an appellate court will not consider matters which were not considered below. The contention that lands subsequently restored must be counted in determining the validity of a withdrawal made perhaps 10 or 15 years earlier is contrary to the theory of adjust-

ment presented below. The parties were agreed that the validity of the withdrawals, under the *Forest Reserve* decision, must be tested by the status of the grant *at the very time the withdrawals were made.* The exhibits for both parties were prepared and submitted on that theory. The company conceded the validity of the Idaho withdrawals of March 21, 1905, because, at the time of withdrawal, there remained sufficient lands. In 1906 and in subsequent years there was a deficiency in Idaho second limits and this withdrawal would have been invalid by the contention which appellant now makes. Had appellant taken the position below it now takes, the company could, if that position had been sustained, have shown that withdrawals conceded valid became invalid because afterwards a deficiency occurred.

At p. 225 the statement is made that second indemnity belts were laid down only on request of the company. Materiality of this is not perceived. The statement is incorrect. The Land Department decided when withdrawals should be made and they were laid down sometimes on request of the company, sometimes on the Land Department's own motion, generally the latter. In 2 L. D. 511, the Northern Pacific requested the Secretary to lay down second limits and withdraw lands, which that officer refused to do. The laying down of second limits and withdrawal of lands has always been entirely within the province of the Secretary of Interior.

Another argument is that the effect of the ruling below is to invalidate every withdrawal, even if the deficiency exceeded available lands by only a single acre. The argument is specious and unsubstantial. The only effect of

holding the withdrawal invalid, where there was a deficiency of less acreage than was withdrawn, is that the company is permitted to exercise its statutory right to make its own selections of lands from those withdrawn. *The withdrawal remains valid as to all the lands which the company does not select.* Appellant's contention amounts only to a complaint that the company was permitted by the decree below to exercise its right of selection under express provisions of both grants. Appellant does not argue that the company is not entitled to make its own selections. Payne v. C. P. Ry., 255 U. S. 228.

L. *Patents for* 428,986.68 *Acres* (p. 243).

It is argued that there are 45,180.60 acres of indemnity lands erroneously awarded by the decree. These lands were not expropriated, as they are not within the reserves. They would have been patented long ago but for the Joint Resolution of June 5, 1924, suspending patents. Patents were decreed below, and the United States, in its brief last term, said, p. 21:

> "The decree quiets title to the lands from the indemnity belts retained by the United States in the forest reserves and other reserves *and directs the issuance of patents to the company for 428,986.68 acres* (R. 643), *mostly in place limits of the grants. In these and several other respects the decree is not the subject of this appeal.*"

The statement, p. 243, that the 383,803.08 acres of place lands were not patented because the company did not pay survey and transfer fees is erroneous. As stated, the

reason is that the Joint Resolution of 1924 suspended patents. Insofar as survey fees are concerned, the decree, Paragraph VI, R. 643, provides for payment of patent and survey fees covering the lands for which patents were awarded

> "after crediting thereon any amount heretofore paid by Northern Pacific Railway Company therefor * * *."

The amount on deposit with the Secretary, so to be credited, is and long has been approximately $65,000.

At p. 244 it is said that the company has not made a tract-for-tract designation of losses for the 45,180 acres. There was never any occasion for such proof. Appellant's witness, Barber, testified that base is designated on the lists filed in the Land Department. The United States charged this 45,180 acres of indemnity lands to the company, as lands to which it was entitled, in all its exhibits, particularly Nos. 103 Revised, Grant of 1864, and 210 Revised, Grant of 1870. That is to say that the Government conceded that the selections were valid and the company's right to patent for these lands, and the Master credited the United States accordingly.

We wish again to emphasize our objection to repeated efforts of appellant to inject on appeal questions not raised below. Had any such question been raised and passed upon by the Master, the facts found would have left no possible basis for appellant's erroneous statements and arguments.

M. *That there Would have been no deficiency if the Company had constructed the Wallula-Portland Line* (p. 246).

This point was not made below until after conclusion of the hearings before the Master and argument in the District Court. It was taken by objection to the findings, R. 595. The objection certainly was too late. The consequence of nonconstruction of the Wallula-Portland line has been sufficiently discussed in other places. We deem the point too unsubstantial to require discussion. It sufficiently answers itself.

N. *That the Company is not entitled to compensation for all the lands because it did not show that it could or would have selected or obtained all such lands* (p. 250).

We do not find that this point ever was raised below, having been first presented by assignments 42 and 43 in this Court. It certainly was not presented to the Master, nor passed upon by the District Court. But be that as it may, the *Forest Reserve Case,* supra, is a complete answer. It was so regarded by both parties below. The record shows and the Master found that the company had repeatedly attempted to select but its selections were rejected, as the Secretary invariably held that he was bound to respect the withdrawals. *Forest Reserve Case;* see also Master's Report, R. 502. The argument proves too much; for, if a portion of the indemnity lands could have been appropriated by the United States for this reason, by the same token, every foot of the indemnity lands could have been withdrawn and thereby the indemnity rights con-

ferred by the two grants would have been totally defeated. See *Forest Reserve Case,* supra. We wish to deny the statement, p. 253, that the company was remiss in making its selections. It used supreme diligence in doing so as soon as the lands were surveyed and made available for selection. The only instance mentioned is in Idaho first limits. Government exhibit 95 shows that the largest area of surveyed lands was 13,116.28 acres on October 4, 1880, which includes land afterwards classified mineral. In 1885, 9,331.13 acres were selected, and at the end of that year there were only 1,592.61 acres available. As lands were surveyed and became available, they were selected, as in 1888, when the company selected 18,400 acres. The first subsequent year in which there was any considerable area available was 1894, at which time there were 10,321.84 acres available and the company selected over 8,000 acres. At the end of 1895 there were only 5,918.10 acres available, and that included lands afterwards classified mineral. After second limits were established in 1906, the company selected 30,299.30 acres, and at the end of that year there were only 3,786.68 acres available. In the narrative statement of evidence, p. 212, there is an anlysis of Government exhibits 95 and 96, which shows the status after the withdrawals. It shows a large acreage of land, but the surveyed is included with the unsurveyed. Unprinted narrative statement, p. 210, shows that defendant objected to the exhibit on the ground that it did not segregate the unsurveyed from the surveyed lands so that the lands available for selection could be identified. The same objection was made to exhibit 96, narrative statement, p. 211. This contention was not made below before the Master.

Comment On Appendix.

At risk of tedium, we have to say about Appendix A President Coolidge's letter, p. 256, that it appears from it, p. 258, that it is a summary of a brief filed by the attorney for the Forest Service who represented it at the Joint Committee hearings, prepared the bill, and had charge of the case for a number of years, when he was superseded. This document, to which the President's name is signed, contains most of the erroneous and unsubstantial charges which were contained in the bill of complaint and disposed of by the District Court, especially the grossly erroneous statement that the company received from sales of lands more than the cost of constructing the railroad. The amount of gross proceeds stated at p. 77, $126,118,533.14, is expanded in the brief to the extravagant figure of over $200,000,000.

Appellees submit that the judgment should be affirmed and so pray.

Respectfully submitted,

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APPENDIX.

The following is reprinted from appellees' brief before the Master, pp. 98-107:

Legislative History.

A review of the legislative history of the passage of the Joint Resolution will demonstrate three things, all of vital importance in construing the proviso relative to settlement and preemption:

1. The Senate and the House by positive action refused to make the proviso apply to lands granted by the Act of July 2, 1864, and made it applicable only to the lands granted by the Joint Resolution of May 31, 1870.

2. The Senate and the House by positive action rejected the suggestion that there be incorporated in the resolution the requirement that lands granted to the Northern Pacific Railroad Company be sold to actual settlers at $2.50 per acre as was provided with respect to the grants to the Oregon & California Railroad Company by the Act of April 10, 1869 and the Act of May 4, 1870.

3. The Senate and the House by positive action rejected the suggestion that the mortgages authorized by the Joint Resolution be made subject to the right of settlers to purchase the lands.

In summarizing the legislative history of the adoption of the Joint Resolution the intention is to show merely what propositions were presented and voted upon and the "changes made in the frame of the bill in the course

of its passage." Debates are omitted, but where there is a statement, as for example, by the author of some amendment, which throws light on what was sought to be accomplished, that statement is given.

In the United States Senate on February 8, 1870 (Congressional Globe, 41st Congress, Second Session, p. 1097) Senator Ramsey introduced a joint resolution (S. J. Res. 121) authorizing the Northern Pacific Railroad Company to issue its bonds for the construction of its road and to secure the same by mortgage. The resolution was referred to the Committee on the Pacific Railroad and ordered printed. On oral argument a certified copy of the resolution was handed to the Master.

On February 22, 1870 (p. 1477) Senator Howard, from the Committee on the Pacific Railroad, reported the Joint Resolution with amendments.

On February 28, 1870 (p. 1584) Senator Howard moved to take up the Joint Resolution. A number of amendments were offered and agreed to, and there was extended debate on this day of various provisions of the Joint Resolution.

On March 2, 1870 (p. 1624) the Joint Resolution was again taken up and debated. Senator Wilson offered this amendment:

> "The additional alternate sections of land hereby granted by this act shall be sold by the company only to actual settlers in quantities not exceeding 160 acres or quarter section to any one settler at prices not exceeding $2.50 per acre."

In introducing the amendment Senator Wilson said:

> "I do not wish to take a moment of time; but I will

simply say that I do not desire to interfere with any grants we have already made to railroads. But here is a new grant to be made, and I maintain, for one, that all future grants which we make in any part of the country shall have such a provision as that upon it if I have the power to put it on."

The Joint Resolution was again taken up in the Senate on April 7, 1870 (p. 2480). The amendment offered by Senator Wilson was debated. Senator Howell said:

"Mr. Howell. Mr. President, I would move in addition to the amendment now pending that its provisions shall apply as well to the original act as to this act amending that original act. I am sorry that the resolution which I introduced some time ago could not have been brought up before this bill, that the question might have been argued on the general principles and policy affecting this subject without applying it to this special bill; but the bill is before us.

"The Vice President. The Chair will state to the Senator from Iowa that his motion to amend the amendment is now in order. It now reads 'the additional alternate sections of land hereby granted by this resolution.' His amendment, as the Chair understands, would be to make it read 'alternate sections of land heretofore granted and hereby granted.'

"Mr. Howell. That is the object of my amendment.

"The Vice President. The Senator from Iowa moves to amend the amendment by inserting the words 'heretofore granted and' after the word 'land.'"

After considerable debate Senator Howell withdrew his amendment, but it was renewed by Senator Casserly. Senator Pomeroy said that the amendment which was

renewed applied the provisions of the amendment to the old grant. Senator Casserly said:

> "That was not my intention. My intention was to apply the original amendment to the new grant."

Later in the debate Senator Casserly said:

> "If the Senator from Nevada will allow me one moment, I wish to withdraw the amendment which I renewed. It seems I did not fully understand the terms of it. If it undertakes to deal with the lands already granted, of course I shall not wish to offer any such amendment. I ask leave to withdraw it."

The amendment of Senator Wilson was again before the Senate. There was considerable debate, but no vote.

On April 9, 1870 (p. 2539) consideration of Senator Wilson's amendment was resumed.

On April 11, 1870 (p. 2569) Senator Wilson withdrew the amendment in order to permit Senator Thurman to offer an amendment. It provided that sales of lands "heretofore or hereby granted" should be to actual settlers in quantities of not more than 160 acres at a price of $1.25 per acre and that any mortgages put on the lands should be subject to the conditions in favor of actual settlers and that no foreclosure sale should deprive settlers of these privileges.

Senator Wilson said:

> "I move to strike out in the amendment the words 'heretofore or,' so that the terms of the amendment of the Senator from Ohio will apply only to so much of the land as is granted by this resolution, and will not interfere with the original grant. I do not wish to take anything of that grant away."

Senator Thurman objected to the amendment, saying:

"If that amendment prevail, the amendment I offered will then be worth scarcely the paper on which it is written. It will apply but to the comparatively small portion of land which the company will acquire by virtue of this resolution. I say 'comparatively small,' for though it will be very considerable in amount, absolutely considered, yet as compared with the grant made by the original charter it will be small."

When the question was about to be put to vote, the following occurred:

"The Presiding Officer. The question is on the amendment proposed by the Senator from Massachusetts (Mr. Wilson).

"Mr. Casserly. I am not certain that I understand the amendment. As it was offered the other day it affects the entire grant, both the original and this new one.

"The Presiding Officer. The amendment of the Senator from Massachusetts is an amendment to the amendment of the Senator from Ohio.

"Mr. Casserly. I should like to ascertain from the Senator from Massachusetts what is before the body.

"Mr. Wilson. I will simply say that my amendment is to strike out the words 'heretofore or,' so that the provisions of the amendment of the Senator from Ohio shall apply to the grant now made, and not to the original grant.

"Mr. Casserly. Does the Senator withdraw his own amendment?

"Mr. Wilson: I withdrew my first amendment at the request of the Senator from Ohio to allow him to move this amendment. His amendment is drawn up evidently with a great deal of care and accuracy,

and if it is so amended as to apply merely to the grant made in this joint resolution I shall vote for it most cheerfully.

"Mr. Casserly. Then, I understand that the amendment of the Senator from Massachusetts strikes out certain words from the amendment of the Senator from Ohio.

"Mr. Conkling. It makes it prospective, and not retrospective also.

"The Presiding Officer. The question is on the amendment of the Senator from Massachusetts to the amendment of the Senator from Ohio."

The question being taken by yeas and nays, resulted—yeas 30, nays 9. So the amendment by direct vote was limited to lands granted by the Joint Resolution. A vote was then taken on the amendment of Senator Thurman as amended, and it was rejected.

Senator Wilson renewed the amendment that he had made and again said.

"I will simply say that this does not interfere with anything that we have done; we maintain our truth and faith; but it applies simply to the additional land granted by this resolution."

The amendment was rejected—yeas 15, nays 22.

On April 20, 1870 (p. 2833) Senator Wilson offered another amendment providing among other things that the lands granted, with the exception of lands reserved for depots, etc., should be sold at prices that would secure to the Company an average price of not more than $2.50 per acre. Senator Casserly offered a substitute amendment much the same as that offered by Senator Wilson and said, speaking of his own amendment:

"I ask leave to correct the amendment in two particulars. I propose to strike out in line thirteen, page 1, from the word 'lands' down to the word 'lands' in the fifteenth line, on the second page, the object being to make it clear that it only applies to such lands as are granted by this resolution."

Senator Wilson said:

"I will simply say in regard to my amendment that it has been agreed to, assented to, and approved by the Committees on Public Lands of both Houses. I I think it only applies to the additional land granted by this bill."

Senator Casserly's amendment and Senator Wilson's amendment were defeated.

Senator Howell offered this amendment:

"*Provided,* That all the lands granted by this resolution which shall not be sold or disposed of by said company within three years after the road shall have been completed shall be subject to settlement and pre-emption like other lands, at a price not exceeding $1.25 per acre to be paid to said company."

Attention was drawn to the fact that this was an exact copy of the provision in the Union Pacific Railroad bill. Senator Howell's amendment was rejected—yeas 13, nays 34. Senator Casserly then proposed the same amendment except that the time for the proviso taking effect was extended to ten years from the completion of the road. This amendment was rejected. It was then agreed that at three o'clock on the following day the Senate would proceed to the final vote upon the Joint Resolution.

On April 21, 1870 (p. 2867) the discussion was continued. This is the day the Joint Resolution was adopted. Senator Scott offered an amendment which is the proviso as it reads in the Joint Resolution.

Senator Cameron offered an amendment which was adopted, reading:

> *"Provided,* That in the construction of the said railroad American iron and steel only shall be used, the same to be manufactured from American ores exclusively."

The Joint Resolution was then adopted—yeas 40, nays 11.

On May 5, 1870, the Joint Resolution was taken up in the House of Representatives (p. 3263). There was a great deal of debate on that day and succeeding days, and on May 11, 1870 (p. 3365) some 24 amendments were offered to the resolution. All of these amendments were voted down on May 25 and 26. Among the amendments rejected were these:

An amendment offered by Representative Hawley of Illinois, reading:

> "Add to the first section as follows:
>
> *"And provided further,* That the privileges herein granted are upon the following conditions, namely: All the lands herein or heretofore granted to said railroad company shall be sold to actual settlers only, and in quantities not greater than 160 acres to any one person; and for a price not exceeding $2.50 per acre; *And provided further,* That no mortgage that may be given by said railroad company shall operate to prevent the sale to actual settlers only, upon the terms and conditions herein provided, of all the lands

herein or heretofore granted by the United States to said railroad company, and any violation of this condition shall work a forfeiture of all the lands herein or heretofore granted by the United States to said railroad company."

An amendment offered by Representative Sargent of California, reading:

"*Provided,* That all lands granted to said company shall be subject to settlement and pre-emption like other lands at a price to be paid to said company not exceeding $2.50 per acre; and if the mortgage hereby authorized shall at any time be enforced by foreclosure or other legal proceeding, or the mortgage lands hereby granted, or any of them, be sold by the trustees to whom such mortgage may be executed, either at its maturity or for any failure or default of said company under the terms thereof, such lands shall be sold at public sale at places within the States and Territories in which they shall be situate, after not less than sixty days' previous notice, in single sections or sub-divisions thereof, to the highest and best bidder; and the purchasers at said sale, except actual settlers on not greater subdivisions than one hundred and sixty acres, shall acquire no higher interest in said lands than is by this act granted to said company; and as to all lands purchased under any such sale by any corporation or by other persons greater in quantity than one quarter section for any one person, all such lands shall be and remain subject to the right of purchase by actual settlers at the price not exceeding $2.50 per acre, and in amounts not exceeding one quarter section, by any one person, under such rules and regulations as the Secretary of the Interior may prescribe to carry this provision into effect."

An amendment offered by Representative Welker, reading:

> "*Provided further,* That as to all new grants herein of additional lands, such lands, excepting pine and fir timber lands and mineral lands, shall be sold by said company to actual settlers at a price not exceeding $2.50 per acre, and in quantities not exceeding 160 acres to any one person, under such regulations as may be prescribed by the Secretary of the Interior."

An amendment offered by Representative Clarke of Kansas, reading in part as follows:

> "Sec. 12. *And be it further resolved,* That the lands granted by this act and all previous acts to said company shall inure to the benefit of said company, its assigns and successors, in the manner following; that is to say: That all the lands shall be immediately open to settlement, and shall be sold to actual settlers only, who shall be entitled to receive patents therefor in contiguous parcels not exceeding a quantity equal to one-quarter section to any one person, and at the price of $2.50 per acre, under such rules and regulations as may be prescribed by the Secretary of the Interior, in accordance with the provisions of this act:"

As stated above, all of these amendments were rejected. The Joint Resolution was then adopted in the form it had passed the Senate.

From this legislative history it is perfectly clear that both in the Senate and in the House the question whether the proviso should be made applicable to lands granted under the original Act as well as under the Joint Resolution was fully debated and the proposition emphatically

rejected several times. The action in the Senate by direct vote on April 11, 1870, approved an amendment offered by Senator Wilson limiting Senator Thurman's amendment to lands granted by the Resolution. The fact that Senator Thurman's resolution was later rejected does not militate against the view that the Senate by its vote on Senator Wilson's amendment approved limiting any proviso that might be adopted to lands granted by the resolution.

There was a clean-cut vote (*supra*, p. 103), on Senator Wilson's amendment which reads:

> "The additional alternate sections of land hereby granted by this act shall be sold by the company only to actual settlers in quantities not exceeding 160 acres or quarter section to any one settler at prices not exceeding $2.50 per acre."

That was a positive rejection of a proviso made in the identical language of the proviso in the Oregon & California grant that was construed by the Supreme Court in 238 U. S. to be a covenant. It may also be said that by the rejection of Senator Thurman's amendment the Senate rejected the proposition that the mortgages be subject to the rights of settlers, though Senator Thurman's amendment did include a provision requiring that sales be made to actual settlers at a price not exceeding $1.25 per acre. The course of the Resolution in the House, after it had been adopted in its present form in the Senate, shows a clean-cut rejection of amendments that would make the proviso applicable to lands under the original grant as well as under the grant made by the Resolution, that would have required sales to actual settlers at $2.50

per acre as in the Oregon & California grant and would have required that mortgages be subject to the rights of settlers.

If therefore it be argued that there is any ambiguity in the meaning of the words, "hereby granted", (and it is our position that there is not the slightest ambiguity) this legislative history demonstrates that the intention of Congress was to confine the application of the proviso to the place lands between Portland and Puget Sound, granted by the Joint Resolution. It is likewise perfectly clear that Congress refused to insert a covenant requiring sales to actual settlers at $2.50 per acre. Finally it is clear Congress refused to make the mortgages authorized subordinate to the right of settlers to pre-empt.

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